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No. 85-1033

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JOHN J. KELLY,
CONNECTICUT CHIEF STATE'S ATTORNEY, *et al.*
Petitioners,
v.
CAROLYN ROBINSON
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Is a criminal restitution order imposed as a condition of probation a "debt" within the meaning of the Bankruptcy Code?

2. In any event, is a criminal restitution order a "penalty" exempt from discharge under the Bankruptcy Code?

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Pursuant to Rule 36 of the Rules of this Court, *amici* respectfully move for leave to file the appended brief

amici curiae in support of petitioners. Petitioners have consented to the filing of this brief. The motion is made necessary by the refusal of respondent to consent to the filing of the brief.

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. The case now before the Court raises an issue of grave concern to *amici*. The Court of Appeals for the Second Circuit ruled that a discharge under the federal Bankruptcy Code automatically nullifies a state court's criminal sentence requiring restitution as a condition of probation. This decision flies in the face of this Court's longstanding policy, based on principles of federalism and comity, against federal court interference with state criminal prosecutions. The decision below also ignores the established principle that federal bankruptcy laws are designed to relieve honest debtors of their civil obligations, not to impede the authority of the States to enforce criminal laws.

As a practical matter, this ruling, unless reversed by this Court, will discourage state courts from utilizing restitution orders in criminal sentencing, and thus eliminate a form of punishment that state legislatures and courts have determined is the most appropriate for many crimes. The ruling may require state courts to rely more heavily on incarceration to punish criminal defendants. As a result, this decision may place added burdens on the States' already taxed prison systems.

Amici submit that the ruling below is erroneous. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.

Respectfully submitted,

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April 30, 1986

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INTEREST OF THE *AMICI CURIAE*

The interest of *amici* is set forth in the motion accompanying this brief.

STATEMENT

The respondent pleaded guilty in Connecticut Superior Court to the crime of larceny. This criminal conviction was based on the unlawful receipt of some $9,000 in public assistance benefits from the Connecticut Department of Income Maintenance while simultaneously receiving social security benefits. The court sentenced her to a prison term of one to three years, execution of which was suspended, and to a term of probation for five years on the condition that she make monthly restitution payments of $100 to the State. Respondent subsequently filed a bankruptcy petition and obtained a discharge of her "debts" under Chapter 7 of the federal Bankruptcy Code ("the Code").

After receiving her discharge, respondent informed the State of Connecticut of her belief that the discharge excused her from any obligation to comply with the terms of her probation, and she ceased making restitution payments. When the State informed respondent that it expected her to comply with the criminal sentence, she initiated this proceeding in the bankruptcy court seeking, among other things, a declaration that the restitution obligation had been discharged, and an injunction prohibiting the State from taking any steps, including revocation of probation, to obtain further restitution.

The bankruptcy court denied relief. The court held that a restitution order imposed as a condition of bankruptcy does not constitute a "debt" within the meaning of section 101(11) of the Code and, even if it were a debt, such a debt would be a "penalty" exempt from discharge under section 523(a)(7) of the Code. The district court adopted those conclusions.

The Court of Appeals for the Second Circuit reversed. First, the court held that the language of the Code is "sufficiently broad" to capture a criminal restitution order within the term "debt." Appendix to Petition for *Certiorari* (hereafter "Pet. App.") 37A. Second, the

Court held that a criminal restitution order is not exempt from discharge as a "penalty" because this sanction has "compensation for actual pecuniary loss as at least one of its purposes." Pet. App. 52A. Finally, viewing respondent's motion for an injunction as a request for "clarification and particularization" of the injunction already in effect under Code section 524, the court remanded for entry of "an order enjoining defendants from taking *any* steps to recover further restitution payments." Pet. App. 54A (emphasis added). In a reluctant concurring opinion, Judge Mansfield characterized the result as "unfortunate" because it will "stultify and render useless criminal restitution payments as a means of punishing persons convicted of felonies involving theft or fraudulent procurement of money or property." Pet. App. 55A.

SUMMARY OF ARGUMENT

1. It is established federal policy that federal courts should avoid interfering with state criminal prosecutions, and Congress expressly incorporated that policy in the federal Bankruptcy Code. In blatant violation of that policy, the ruling by the court below authorizes federal bankruptcy courts to nullify monetary sanctions imposed as part of a state court's criminal sentence. The decision, unless reversed, would distort state criminal law enforcement and also may subvert the purpose of the Bankruptcy Code.

2. It is also established federal policy that the bankruptcy laws are not intended to interfere with state criminal prosecutions, and nothing in the legislative history of the Code indicates that Congress intended to alter that policy. A criminal restitution order imposed as a condition of probation does not create a debt within the meaning of the Bankruptcy Code because such an order does not create a "right" to payment. Furthermore, although a criminal restitution order may have an incidental compensatory effect, a restitution order

does not create a debt because the purposes of criminal restitution are deterrence, retribution, and rehabilitation.

3. Even if a criminal restitution order did create a "debt," that debt would be a "penalty" exempt from discharge under the Code. The essential purpose of any term of a criminal sentence, even if it orders the payment of money, is punishment, not compensation.

ARGUMENT

I. A FEDERAL BANKRUPTCY COURT'S DISCHARGE OF A STATE COURT'S RESTITUTION ORDER IMPOSED AS A CONDITION OF PROBATION AFTER CRIMINAL CONVICTION INTRUDES EXCESSIVELY UPON STATE CRIMINAL LAW ENFORCEMENT.

This Court has repeatedly emphasized that the federal courts should avoid interfering with the States' front-line responsibility for enforcing criminal laws. The court below disregarded this important feature of "Our Federalism" in holding that a discharge in bankruptcy automatically nullifies a criminal sentence requiring a convicted criminal to make restitution as a condition of probation.

As the Court stated in *Younger v. Harris*, 401 U.S. 37, 43 (1971), this Nation has a "longstanding public policy against federal court interference with state court proceedings." This policy applies with special force to state criminal proceedings, because "[t]he States possess primary authority for defining and enforcing the criminal law," and "[f]ederal intrusions into state criminal trials frustrate . . . the States' sovereign power to punish offenders . . . ." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). As the Court explained in *Younger* (401 U.S. at 44), the policy of deference to state criminal proceedings is based on the "vital consideration" of "comity"—

> that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a

> continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

The duty to avoid interfering with state criminal proceedings is equally binding on federal courts exercising bankruptcy jurisdiction. *See Barnette v. Evans*, 673 F.2d 1250, 1251-52 (11th Cir. 1982). Congress explicitly incorporated the federal policy of deference to state criminal proceedings in the 1978 Bankruptcy Code. As Congress recognized: "The bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension. Thus, criminal actions and proceedings may proceed in spite of bankruptcy." H.R. Rep. No. 595, 95th Cong., 1st Sess. 342, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6299. *See also* 11 U.S.C. § 362(b)(1). This policy applies *a fortiori* in proceedings presided over by bankruptcy judges, because they do not exercise the judicial power of the United States under Article III of the Constitution. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and P.L. 98-353, the Bankruptcy Reform and Judgeship Act of 1984. Federal bankruptcy judges should have even less authority than Article III federal courts to interfere with state criminal proceedings.

It is indisputable that the decision of the court below substantially intrudes upon the criminal law enforcement responsibility of the State of Connecticut. The ruling completely excuses the convicted offender from any further obligation to make restitution payments. Thus, the ruling destroys the "reforming discipline" that the superior court's sentence of probation was intended to place on the offender. *Korematsu v. United States*, 319 U.S. 432, 435 (1943).

Beyond that, however, it appears that the ruling below effectively disables the State from enforcing any criminal sanction on this offender. Section 524 of the Code states

that a discharge in bankruptcy "operates as an injunction against . . . *any* act . . . to collect . . . any [discharged] debt." (Emphasis added.) *See also* H.R. Rep. No. 595, *supra*, at 80, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 6321-22 (section 524 "is intended to insure that once a debt is discharged the debtor will not be pressured in any way to repay it"). Relying on this provision, respondent sought and obtained from the court of appeals a remand for entry of an injunction that would effectively bar the State from seeking to revoke respondent's probation and from requesting alternative punishment, including incarceration. *See* Pet. App. 54A; *see also* 11 U.S.C. § 525, Brief of Petitioners, n.12. Thus, unless reversed, that decision will allow this offender to escape all responsibility for her crime, and it will frustrate the State's vital interest in effectively enforcing its criminal laws.

This result is utterly unreasonable. The bankruptcy court could not have collaterally reviewed and discharged the offender's criminal sentence if the State had insisted on a term of incarceration in the first instance. As another bankruptcy court has observed, "[t]he result should not be different merely because the state chose a less restrictive means to further its penal goals." *In re Vik*, 45 B.R. 64, 68 (Bkrtcy. N.D. Iowa 1984).

The States must have the authority to impose sanctions for crime. These sanctions must be effective enough to punish criminals and deter potential law-breakers. Acceptance of the ruling below, however, would severely limit the options available to the State of Connecticut and to other States for punishing crime. Under that ruling, a large number of convicted criminals could launch collateral attacks on their criminal sentences by invoking the federal bankruptcy laws.

Thus, the decision below would distort state criminal enforcement in several ways. In order to ensure that their criminal laws have any teeth at all, the States may be forced to incarcerate more criminals instead of relying

on probation, even where probation would otherwise be an appropriate sanction. This pressure would deprive the States of the sentencing option that their legislatures and courts have determined is most appropriate for many crimes. It also would subject offenders to sentences that are needlessly harsh and less appropriate for their crimes. Moreover, heavier reliance on incarceration would impose yet greater burdens on the already over-taxed state prison systems. *See* U.S. Department of Justice, *Bureau of Justice Statistics Annual Report Fiscal 1985*, 35 (April, 1986).

Ironically, by diminishing the value of restitution orders as a criminal sanction, the ruling below may actually subvert the goals of the federal bankruptcy laws. The purpose of the Code is to relieve persons who are being crushed by their debts and to provide them a "fresh start" in life. *See Perez v. Campbell*, 402 U.S. 637 (1971). If the States were forced to jail impecunious criminals because they could nullify probation simply by filing for bankruptcy, those offenders would have less of an opportunity to obtain the "fresh start" that the Code is intended to provide.

In sum, the decision below constitutes a severe intrusion on the States' power to punish criminal offenders and subjects the state courts' criminal sentencing decisions to nullification by federal bankruptcy judges. Because crucial principles of federalism and comity are at stake, this Court should sustain the decision only if the language of the Code and congressional intent clearly compelled that result. In construing the Code, the Court should presume that Congress did not intend to preempt state authority. In fact, as we shall explain, it is clear that Congress did not intend to make a restitution order imposed as a condition of probation a debt dischargeable in bankruptcy.

II. CONGRESS DID NOT INTEND A DISCHARGE UNDER THE BANKRUPTCY CODE TO NULLIFY STATE CRIMINAL PROCEEDINGS AND JUDGMENTS.

A. A Criminal Restitution Order Imposed As A Condition Of Probation Is Not A "Debt" Within The Meaning Of The Bankruptcy Code.

Section 727(b) of the Bankruptcy Code authorizes bankruptcy courts to discharge an applicant's "debts." Section 101(11) defines a "debt" as a "liability on a claim." Section 101(4)(A) defines a "claim" as a

> *right to payment*, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(Emphasis added.) Thus, the essential feature of a dischargeable debt is that someone has (or may have) a "right to payment" from the person who is applying for a discharge of his debts.

The holding by the court below that a criminal restitution order creates a "right to payment" is contrary to the established principle that a discharge in bankruptcy does not permit a debtor to avoid a criminal sentence. First, as the court of appeals itself recognized (Pet. App. 36A-37A), its construction of the term "right to payment" flies in the face of a long line of bankruptcy court decisions reaching a virtual consensus that a criminal restitution order does not create a "right to payment" or a "debt" within the meaning of the Code. *See, e.g., In re Oslager*, 46 B.R. 58 (Bkrtcy. M.D. Pa. 1985); *In re Vik, supra; In re Pellegrino*, 42 B.R. 129 (Bkrtcy. D. Conn. 1984); *In re Button*, 8 B.R. 692 (Bkrtcy. W.D. N.Y. 1981); *but see In re Brown*, 39 B.R. 820 (Bkrtcy. M.D. Tenn. 1984). In addition, the court's construction conflicts with the rule adopted in at least three other circuits that a discharge in bankruptcy does not bar an order in a subsequent criminal proceeding re-

quiring the debtor to make restitution to a victim whose civil debt has been discharged. *See United States v. Alexander*, 743 F.2d 472 (7th Cir. 1984); *United States v. Carson*, 669 F.2d 216 (5th Cir. 1982); *see also Barnette v. Evans*, *supra* (adopting holding in *Carson*). The court's attempt to distinguish those cases rested on a mistaken view of when dischargeable claims arise.[1]

These decisions interpreting the Code are consistent with the rule under the prior Bankruptcy Act that monetary penalties imposed in criminal proceedings, including restitution orders, did not create "debts." Indeed, so far as we are aware, every court that addressed the question under the Bankruptcy Act clearly and unequivocally held that a restitution obligation imposed as a condition of probation was not a "debt." *See People v. Washburn*, 158 Cal. Rptr. 822, 825 (Cal. Ct. App. 1979) ("the Bankruptcy Act does not contemplate . . . that its provisions would apply to orders for restitution as conditions of probation"); *People v. Mosesson*, 356 N.Y.S.2d 483 (N.Y. Sup. Ct. 1974) ("A condition of restitution in a sentence of probation is a part of the judgment of conviction. It does not create a debt or a debtor/creditor

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[1] The court erroneously assumed that a "debt" based on a restitution order would not arise until the order was entered. Contrary to the court's assumption, however, a debt "arises" for bankruptcy purposes when the *claim* arises under state law, not when judgment is entered on the claim. *See, e.g., In the Matter of M. Frenville Co.*, 744 F.2d 332, 337 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 911 (1985); *In re UNR Industries*, 29 B.R. 741, 745 (N.D. Ill. 1983), *appeal dismissed*, 725 F.2d 1111 (7th Cir. 1984).

Because the States' right to prosecute the crimes and thus to *seek* restitution in those cases "arose" prior to the bankruptcy proceedings, the debtors' obligations under the restitution orders would have been dischargeable if liability for criminal restitution were a "debt" within the meaning of the Code. Thus, the holdings in those circuits that a discharge in bankruptcy does not bar entry of a restitution order in a subsequent criminal proceeding necessarily rests on the principle that criminal liability for restitution is not a "debt."

relationship between the persons making and receiving restitution."); *see also People ex rel. Auerbach v. Topping Bros.*, 359 N.Y.S.2d 985 (N.Y. Crim. Ct. 1974) (following *Mosesson*). Furthermore, those Bankruptcy Act decisions explicitly recognized that this rule achieves a proper balance between the purposes of the federal bankruptcy laws and the goals of the criminal law:

> The purpose of our bankruptcy laws is humane in nature. They set forth the policy of our government to aid individuals from being totally crushed under a mountain of debt. They are not, however, the last refuge of a thief seeking a loophole to avoid criminal responsibility.

People v. Mosesson, supra, 356 N.Y.S.2d at 584; *see also People v. Washburn, supra*, 158 Cal. Rptr. at 825.

Those decisions reflected the general rule under the Bankruptcy Act that monetary sanctions in criminal proceedings were not "debts." *See Spalding v. New York ex rel. Backus*, 45 U.S. 21 (1845); *Parker v. United States*, 153 F.2d 66 (1st Cir. 1946); *In re Moore*, 111 F. 145 (W.D. Ky. 1901); *but see In re Alderson*, 98 F. 588 (D. W.Va. 1899). *See generally* 3A *Collier on Bankruptcy* ¶ 63.12, at 1836 (14th ed. 1975) ("It is almost generally accepted that the liability for a fine or penalty is not dischargeable, if for no other reason than the imperative necessity of enforcing criminal sanctions established for the public welfare.")

Although the court of appeals believed that both the pre-Code law and the legislative history of the Code supported its construction of the term "debt," its analysis was seriously flawed. First, based on its reading of sections 57 and 63 of the Bankruptcy Act, *see* 11 U.S.C. §§ 93 and 103a (1976) (repealed), the court concluded that a restitution order imposed as a condition of probation fell within the definition of a "provable" claim, and hence was a dischargeable debt. *See* 11 U.S.C. § 35 (1976) (repealed). *See* Pet. App. 41A. The court, however, simply

overlooked the threshold question whether a restitution order was a "debt" within the meaning of the Act, *see* 11 U.S.C. § 1(14) (1976) (repealed). As we have just explained, the courts had uniformly rejected such an assumption.

Second, contrary to the court of appeals' view, the legislative history relating to the Code definition of "claim" provides no evidence that Congress intended to expand the scope of dischargeable debts to include monetary sanctions imposed in criminal proceedings. Under the Bankruptcy Act, "contingent" or "unliquidated" claims whose estimation or liquidation might be time-consuming were not "allowable" at all in the bankruptcy case and, therefore, were not affected by the discharge. *See* 11 U.S.C. § 93d (1976) (repealed); 3A *Collier on Bankruptcy* ¶ 63.30, at 1912 (14th ed. 1975). The legislative history of the Code demonstrates that the Code's broader definition of "claim" was designed to ensure that the bankruptcy courts would deal with contingent and unliquidated claims in the bankruptcy case.

> [U]nder the liquidation chapters of the Bankruptcy Act, certain creditors are not permitted to share in the estate because of the non-provable nature of their claims, and the debtor is not discharged from those claims. Thus, relief for the debtor is incomplete, and those creditors are not given an opportunity to collect in the case on their claims. The proposed law will permit a complete settlement of the affairs of a bankrupt debtor, and a complete discharge and fresh start.

H.R. Rep. No. 595, *supra*, at 180, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 6141; *see also id.* at 309, *reprinted in* U.S. Code Cong. & Ad. News at 6266 (the broader definition of "claim" in the Code "contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case"); 11 U.S.C. § 502(c) (new provision providing for mandatory estimation of "any contingent or unliquidated claim").

Because criminal restitution orders were not "debts" at all under the Bankruptcy Act, their nondischargeable status did not turn on whether they were "contingent" or "unliquidated." Accordingly, Congress's desire to eliminate technical obstacles to the allowance of claims does not support the notion that Congress implicitly extended the Code definition of "claims" to include criminal restitution orders imposed as a condition of probation.

In sum, nothing in the legislative history of the Code suggests that Congress intended to reject the established policy under the Bankruptcy Act that discharge in bankruptcy does not interfere with a criminal sentence. Thus, contrary to the view of the court of appeals, the most reasonable conclusion is that Congress intended to preserve this rule when it adopted the Code. *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *see also Midlantic National Bank v. New Jersey Department of Environmental Protection*, —— U.S. ——, 106 S.Ct. 755 (1986).

Furthermore, the court of appeals was wrong in concluding that the term "right to payment" can be stretched to include a criminal restitution order. The restitution order in this case did not create a "right to payment" because the State simply had no "right" to obtain money from the offender when she chose not to pay. In general, a sentence of probation gives a criminal the right to "elect" either to comply with the terms of her probation or to risk revocation of the probation. *Cf. United States v. Alexander, supra*, 743 F.2d at 479, *quoting United States v. Mitsubishi International Corp.*, 677 F.2d 785, 788 (9th Cir. 1982) (citing cases).

The offender in this case had a right of election under Connecticut law. Neither the Connecticut Department of Income Maintenance, the victim in this case, nor the Connecticut Office of Adult Probation, has a legal right to collect the restitutionary payments. Perhaps the Probation Office could try to convince the offender to pay by, for example, initiating an action to revoke probation

or to modify its terms. But, in contrast to a liability arising in contract or tort, which does create a "right to payment," the Probation Office could not obtain a court order directly requiring the offender to pay, much less employ process to seize the offender's property to secure payment. Pet. App. 46A-47A.[2]

The conclusion that a restitution order like the one in this case does not create a "right to payment" is confirmed by comparing the criminal sentence here with the debtor's unconditional "obligation" to pay money in *Ohio v. Kovacs*, —— U.S. ——, 105 S.Ct. 705 (1985). In holding that there was a "right to payment" within the meaning of the Code in *Kovacs*, this Court explained the standards for making that determination. Despite the obvious importance of *Kovacs* to the proper resolution of this case, however, the court below completely ignored those standards.

In *Kovacs*, a state court had entered a stipulated judgment requiring Kovacs to clean up a toxic waste site. After he failed to comply with the judgment, the State obtained appointment of a receiver to take control of all of Kovacs' property, and initiated proceedings to require that part of Kovacs' post-bankruptcy income be applied to the unfinished cleanup task. This Court held that Kovacs' obligations under the original injunction had been "converted" into a "right to payment" under Code section 101(4)(B). As the Court explained, appointment of the receiver "disabled" Kovacs from carrying out the cleanup himself, and "the *only* performance sought from Kovacs was the payment of money." *Id.* at 710 (emphasis added). Moreover, as the Court expressly

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[2] The court of appeals acknowledged that the victim in this case, the defrauded state agency, has no "right to payment." Pet. App. 36A-37A. This conclusion was unavoidable because, under Connecticut law, the victim has no right to determine the amount of restitution, no right to testify, no right of appeal, and no right to enforce payment. *See In re Pellegrino*, 42 B.R. 129, 132 (Bkrtcy. D. Conn. 1984).

noted, if Kovacs had failed to pay for the cleanup (and if he had not obtained bankruptcy protection), the State would have had the right to seize Kovacs' property to satisfy the obligation. *Id.* at 709 n.9. Because the State had a right to payment, the Court held that Kovacs' obligation was a dischargeable "debt."

The dischargeable "debt" in *Kovacs* differs critically from the restitution order in this case. In contrast to Ohio's unconditional right to collect money from Kovacs after the receiver was appointed, Connecticut simply had no legal "right to payment" when the offender here elected not to pay. Although Ohio was entitled to seize Kovacs' property to satisfy the "debt," Connecticut had no right to seize the debtor's property to enforce the restitution order. The court of appeals dismissed as irrelevant the fact that Connecticut cannot seize an offender's property to enforce this kind of condition of probation, stating that "[t]he right is not the less cognizable because the obligor must suffer loss of freedom rather than loss of property upon failure to pay." Pet. App. 47A. In fact, that distinction is fundamental to the concept of a "debt" under the Bankruptcy Code. The core of the federal bankruptcy process is the equitable and orderly resolution of claims against the debtor's *property*. By contrast, deprivations of "freedom" upon conviction for crimes are outside the scope of the federal bankruptcy laws.

Finally, a criminal restitution order is not a "debt" because the essential purpose of this sanction is to punish the criminal, not to pay the victim. When it is part of a criminal sentence, particularly a sentence of probation, restitution serves all the traditional purposes of punishment—deterrence, retribution, and rehabilitation. *United States v. Brown*, 744 F.2d 905, 909 (2d Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 599 (1984).

It is an obvious *deterrent;* it takes the profit out of crime by making the criminal disgorge any ill-gotten gains.

Courts also have recognized the *retributive* nature of a criminal sentence requiring restitution. Although making the victim whole is a "usually laudable consequence" of a restitution order, *United States v. Carson*, *supra*, 669 F.2d at 217, that incidental effect does not alter the fact that the purpose of restitution is *punishment* of the criminal. "[T]he focus of any probation regimen is on the offender." *Ibid.* Thus, in *Spalding v. State of New York ex rel. Backus*, *supra*, this Court affirmed a New York court decision holding that a criminal fine is not dischargeable in bankruptcy, even though the New York statute under which the fine had been imposed provided that the victim could receive the fine as compensation for his losses. 45 U.S. at 24-25. As the New York court had explained, "the fine is no less a penalty for a criminal act, and intended as a punishment for the same, than if inflicted for the benefit of the people." *Id.* at 26. *See also Parker v. United States*, *supra*, 153 F.2d at 70-71 (penalty imposed in a criminal contempt proceeding is not a debt even though the court may "order the fine to be paid in whole or in part to some person injured by the contumacious act"). Indeed, restitution is a precisely tuned punishment, because the penalty fits the crime with a special congruence.

The courts also have emphasized restitution's unique value in *rehabilitation* when it is part of a sentence of probation. As this Court has explained, probation is "an individualized program offering a[n] . . . unhardened criminal offender an opportunity to rehabilitate himself without institutional confinement." *Roberts v. United States*, 320 U.S. 264, 272 (1943). *See also Korematsu v. United States*, 319 U.S. 432, 435 (1943) (probation is a "mild and ambulatory punishment . . . intended as a reforming discipline."); *United States v. Alexander*, *supra*, 743 F.2d at 480 ("Fundamental to the imposition of probation is the belief that its conditions will result in the rehabilitation of the probationer at no cost to the public safety.").

Although a probationary restitution order has a compensatory effect, as the court of appeals correctly observed, that effect is essential to achieve the sanction's rehabilitative purpose. It is surely an important component of rehabilitation for the offender to return the stolen money or property to the victim and thereby to acknowledge and correct his wrong in a tangible way. *See United States v. Alexander*, *supra*, 743 F.2d at 480 ("Although imposition of a fine may have the same *pecuniary effect* as restitution on the probationer, the *rehabilitative effect* may well be augmented by the act of making one's victims whole.") (emphases in original). *See also* Marcotte, "Restitution Pays," 72 A.B.A.J. 21 (May 1, 1986) (reporting study documenting rehabilitative effects of criminal restitution orders).

The Connecticut statutes authorizing restitution as part of a criminal sentence emphasize the rehabilitative value of restitution. For example, Conn. Gen. Stat. § 53a-30(a) lists restitution as one of eight alternative conditions that may be imposed in conjunction with a sentence of probation, including conditions relating to employment or education, medical treatment, and support for dependents. The rehabilitative purpose of these conditions, including restitution, is underscored by the final catch-all provision authorizing the court to order a defendant to "satisfy *any other* conditions reasonably *related to his rehabilitation.*" (Emphasis added.) The restitution statute itself directs the court to tailor the amount of restitution in order to fit the personal circumstances of the defendant, including his ability to pay. Conn. Gen. Stat. § 53a-30(a).

Thus, when placed in the context of a criminal conviction and sentence, a restitution order is not a "debt" within the meaning of the Bankruptcy Code.

B. In Any Event, A Criminal Restitution Order Imposed As A Condition Of Probation Would Constitute A "Penalty" Exempt From Discharge.

Even if a restitution order like the one imposed in this case created a "debt," it would be exempt from discharge.

The Code provides that a discharge in bankruptcy does not discharge a debtor from any debt

> to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty . . . .

11 U.S.C. § 523(a)(7). The court of appeals acknowledged that the restitution order here constituted a "penalty" and was obviously for the benefit of a governmental unit. The court, however, also held that the order represented compensation for "actual pecuniary loss" because "at least one of its purposes" was to compensate the State of Connecticut for the money that respondent had illegally obtained from the State. Pet. App. 50A-51A. That latter holding was wrong.

The essential purpose of *any* term of a criminal sentence, even if it orders the payment of money, is punishment and not compensation. Congress recognized the punitive character of criminal restitution when it provided that a federal court on sentencing a defendant convicted of a federal crime "may order, in addition to or in lieu of *any other penalty* authorized by law, that the defendant make restitution to any victim of the offense." 18 U.S.C. § 3579(a) (renumbered § 3663(a) eff. Nov. 1, 1986) (emphasis added). Therefore, even if a criminal sentence has a financial component and even if it is measured by the loss inflicted, the criminal sentence does not provide "compensation for actual pecuniary loss" within the meaning of Code section 523(a)(7). *See In the Matter of Zarzynski*, 771 F.2d 304 (7th Cir. 1985) (obligation to pay costs of criminal prosecution not

"compensation for actual pecuniary loss" because obligation was imposed as punishment and not as compensation); *In re Cox*, 33 B.R. 657 (Bkrtcy. M.D. Ga. 1983) (same); *cf. In re Kovacs*, 9 C.B.C. 279, 282-83 (Bkrtcy. S.D. Ohio 1982), *aff'd*, 717 F.2d 984 (6th Cir. 1983), *aff'd*, —— U.S. ——, 105 S.Ct. 705 (1985) (distinguishing Kovacs' dischargeable obligation to pay compensation in a civil proceeding, which did constitute "compensation for actual pecuniary loss," from restitution order imposed as a condition of probation in a criminal proceeding).

This construction is entirely consistent with judicial interpretation of section 57j of the Bankruptcy Act, *see* 11 U.S.C. § 93j (1976) (repealed), which was virtually identical to the current Code provision. The question whether a "penalty or forfeiture" under the Bankruptcy Act represented compensation for "pecuniary loss" arose only in cases involving sanctions imposed in *civil* proceedings. *See, e.g., United States v. RePass*, 688 F.2d 154 (2d Cir. 1982) (civil penalty under False Claims Act); *In re Abramson*, 210 F. 878 (2d Cir. 1914) (civil penalty under New York Agricultural Law); *Sherwood v. United States*, 228 F. Supp. 247 (E.D.N.Y. 1964) (civil tax penalty). Of course, this focus on civil sanctions was hardly surprising because monetary sanctions in criminal cases, including restitution orders imposed as a condition of probation, were not even considered to be "debts" under the Bankruptcy Act. *See* pp. 9-10, *supra*. There is no evidence in the legislative history of the Code that Congress intended to modify this established practice. Therefore, Code section 523(a)(7) should be given the same limited scope; that is, it should not apply at all to criminal sentences, whatever their terms.

The court of appeals suggested that the State should not be permitted to rely on Code section 523(a)(7) because the State had not filed a complaint under Code section 523(a)(2) or (4) objecting to the respondent's discharge from her debts. (Pet. App. 50A). Those para-

graphs permit a claimant to ask the bankruptcy court not to discharge any "debt" based on fraud or larceny. There are several glaring flaws in the court of appeals' suggestion.

First, the State properly believed that a restitution order does not create a "debt" at all and, therefore, the State had no interest in which of respondent's "debts" would be affected by the discharge.

Second, it would be unseemly to require a state prosecutor to appear as a supplicant in a bankruptcy court in order to ask the bankruptcy judge to honor a prior state court criminal sentence. There is not the slightest hint that Congress intended to distort well-established principles of federal-state judicial comity by imposing such an obligation.

Third, the obligation to defend criminal sentences in bankruptcy courts could impose a substantial burden on the States. Congress did not signify any desire to create such a burden.

Fourth, and perhaps most important, paragraphs (2) and (4) of Code section 523(a) make non-dischargeable only those debts that arise from certain kinds of fraud or larceny. These paragraphs can only apply to civil obligations, not criminal penalties, precisely because they are limited to debts arising from fraud or larceny. The assumption that these paragraphs apply to state criminal sentences would mean that Congress left the States no way in which to preserve restitution orders imposed after conviction for *other* types of crime.

For all these reasons, the provisions allowing bankruptcy courts to decline to discharge certain types of debt must be viewed as dealing solely with civil claims, not with sentences imposed after conviction for fraud or larceny.[3]

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[3] This case does not present the question whether a federal court exercising bankruptcy jurisdiction has the power to enjoin credi-

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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tors from initiating state criminal proceedings for the purpose of evading bankruptcy court jurisdiction and inducing enforcement of a dischargeable debt. *See* 11 U.S.C. § 105 ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of . . . title [11]."). *See generally* 2 *Collier on Bankruptcy* ¶ 105.01, at 105-2 (15th ed. 1985). In contrast to the virtually unanimous view that a criminal restitution order is not a dischargeable "debt," the federal courts appear to be divided on whether a federal court exercising bankruptcy jurisdiction may enjoin pending or threatened state criminal proceedings in those circumstances. *Compare In re Strassmann*, 18 B.R. 346 (Bkrtcy. E.D. Penn. 1982); and *Johnson v. Lindsey*, 16 B.R. 211 (Bkrtcy. M.D. Fla. 1981) *with In the Matter of Davis*, 691 F.2d 176 (3d Cir. 1982); and *In re C. H. Stuart, Inc.*, 12 B.R. 85 (Bkrtcy. W.D. N.Y. 1981).

In light of the established federal policy against federal court interference with state court criminal proceedings, and the limited judicial power of bankruptcy courts, federal bankruptcy courts should have no authority to enjoin ongoing state criminal proceedings. In any event, in the present case, the criminal conviction and sentence *preceded* respondent's bankruptcy filing. There is thus no room for the contention that the State initiated the criminal prosecution for the purpose, much less the "sole purpose," of frustrating the bankruptcy court's jurisdiction. *Johnson v. Lindsey*, *supra*, 16 B.R. at 212. *See* Pet. App. 5A, 24A.